Kumarasamy a/l Sengainy & Ors v Revathy Development (M) Sdn Bhd

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO 507–1985
MOHD GHAZALI JC
30 DECEMBER 1994

Contract *— Contingent contract — Dependant upon obtaining approvals from relevant authorities — Whether contract void if approvals not obtained within specified time — Contracts Act 1950 s 36(1)*

Civil Procedure *— Declaration — Validity of contract — Whether expired through effluxion of time —Whether court has power to order trial as preliminary issue before hearing proper — Rules of the High Court 1980 O 33 r 2*

The plaintiffs as landowners entered into a joint venture agreement dated 14 November 1981 ('the agreement') with the defendant as developer, to develop nine pieces of land ('the land') into a housing estate. The plaintiffs contributed the land and the defendant agreed to be liable for all costs of the actual development of the housing project. The defendant also undertook to obtain the necessary approvals from the appropriate authorities for the sub-division, conversion and the layout plan ('the approvals') and to bear all expenses incurred thereby, within three years, ie by 14 November 1984, with an extension of a further six months. It was also agreed that if for any reason the approvals were not obtained within the stipulated period, then the plaintiffs were entitled to terminate the agreement and neither party would have any claim against the other in particular for moneys expended. It was also provided that time was to be of the essence. The defendant failed to get the approvals within the agreed time and the plaintiffs filed an originating summons seeking, inter alia, a declaration that upon a true and proper construction of the agreement, it had expired through effluxion of time. In its statement of defence, the defendant filed a counterclaim for damages alleging that the plaintiffs had breached the terms of the agreement. The judge ordered that the plaintiff's question be tried as a preliminary point and, after the trial, answered it in the affirmative, thereby granting the plaintiffs the declaration applied for. The defendants have appealed against both orders.

Held, dismissing the appeal:

(1) The plaintiffs' application fell within the contemplation of O 33 r 2 of the Rules of the High Court 1980 ('the RHC') because if the question whether the agreement had expired through effluxion of time were answered in the affirmative, it was likely to be decisive of the litigation. It could well have the effect of granting the declaration sought at that preliminary stage and would result in the saving of considerable time and expense.

(2) It was clear that under the terms of the agreement, once the approvals were not obtained within the period stipulated or extension thereof, both parties were relieved from their obligations which remained unperformed. It was also clear that time was not merely the essence of the contract, but that the fulfilment of the defendant's promise to obtain the approvals on or before 14 November was a condition precedent of the whole agreement. The approvals were not obtained by the deadline and so, upon a true construction of the agreement, it had become void.

(3) However, the expiration of the agreement due to effluxion of time did not preclude the defendant from pursuing his counterclaim against the plaintiffs for breach of contract which would anyway only entitle the defendant to damages in the event it succeeded. The effect of an affirmative answer to the question indirectly affirmed that the defendant had no proprietary or equitable right to the land.

[Bahasa Malaysia summary

Plaintif, sebagai pemunya tanah, telah mengikat suatu perjanjian usahasama bertarikh 14 November 1981 ('perjanjian itu') dengan defendan, sebagai pemaju, untuk membangunkan sembilan bidang tanah ('tanah itu') supaya menjadi suatu kawasan perumahan. Plaintif telah menyumbangkan tanah itu dan defendan bersetuju membiayai semua kos untuk pembangunan projek perumahan tersebut. Defendan juga telah memberi akujanji untuk mendapatkan kelulusan yang perlu daripada pihak-pihak berkuasa yang berkenaan untuk pemecah-bahagian, penukaran dan pelan reka letak ('kelulusan itu') dan untuk menanggung semua perbelanjaan yang berkaitan, dalam masa tiga tahun, iaitu selewat-lewatnya pada 14 November 1984, dengan suatu perlanjutan masa selama enam bulan. Juga telah dipersetujui bahawa jika atas apa-apa sebab juapun, kelulusan itu tidak diperolehi dalam masa yang ditetapkan, jadi plaintif berhak menamatkan perjanjian itu dan kedua-dua pihak tidak akan mempunyai sebarang tuntutan terhadap pihak yang lain, terutamanya bagi wang yang telah dibelanjakan. Juga telah diperuntukkan bahawa masa menjadi asas perjanjian itu. Defendan gagal mendapatkan kelulusan itu dalam masa yang ditetapkan dan plaintif telah memfailkan suatu saman pemula untuk memohon, antara lain, bagi suatu deklarasi bahawa perjanjian itu, atas pentafsirannya yang benar dan wajar, telah luput melalui masa. Di dalam pernyataan pembelaannya, defendan telah memfailkan suatu tuntutan balas untuk ganti rugi dan mengata bahawa plaintif telah memungkiri terma perjanjian itu. Hakim telah mengarahkan supaya soalan plaintif dibicarakan sebagai suatu perkara permulaan dan, selepas perbicaraan tersebut, telah menjawabnya mengiakan, dan dengan itu memberikan plaintif deklarasi yang dipohon. Defendan telah membuat rayuan terhadap kedua-dua perintah itu.

Diputuskan, menolak rayuan itu:

(1) Permohonan plaintif itu termasuk dalam apa yang dibayangkan oleh A 33 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') kerana jika soalan sama ada perjanjian itu telah luput melalui masa dijawab secara mengiakan, ia mungkin memutuskan litigasi itu. Ia mungkin mempunyai kesan bahawa deklarasi yang dipohon itu dibenarkan pada peringkat permulaan dan akan mengakibatkan suatu penjimatan masa dan perbelanjaan yang besar.

(2) Adalah jelas bahawa di bawah terma perjanjian itu, sebaik sahaja kelulusan itu tidak diperolehi dalam masa yang ditetapkan atau perlanjutan tempoh tersebut, kedua-dua pihak dilepaskan daripada obligasi mereka yang masih belum dilaksanakan. Juga adalah jelas bahawa masa bukan sahaja menjadi asas kontrak itu, tetapi bahawa penunaian janji defendan untuk memperolehi kelulusan itu pada atau sebelum 14 November merupakan suatu syarat terdahulu kepada keseluruhan perjanjian itu. Kelulusan itu tidak diperolehi sebelum tarikh akhir itu, dan dengan demikian, atas pentafsiran sebenar perjanjian itu, ia telah menjadi terbatal.

(3) Bagaimanapun, peluputan perjanjian itu melalui masa tidak menghalang defendan daripada meneruskan tuntutan balasnya terhadap plaintif untuk kemungkiran kontrak yang walau bagaimanapun akan hanya memberikan defendan hak untuk mendapatkan ganti rugi jika ia berjaya. Kesan suatu jawapan yang mengiakan kepada soalan itu secara tidak langsung mengesahkan bahawa defendan tidak mempunyai hak ketuanpunyaan atau hak ekuiti di dalam tanah itu.]

[*Editorial Note*: The defendants have appealed to the Court of Appeal vide Civil Appeal No J–02–215–94.]

Notes

For a case on a contingent contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) para 1432.

Cases referred to

Jaafar bin Ibrahim v Gan Kim Kin [1985] 2 MLJ 24 (folld)
Kumarasamy & Ors v Revathy Development (M) Sdn Bhd [1994] 3 MLJ 681 (folld)
National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211 (folld)
Palaniappa Chettiar v Sithambaran Chettiar & Ors [1982] 1 MLJ 186 (folld)
SI Rajah & Anor v Dato Mak Hon Kam & Ors (No 1) [1994] 1 CLJ 207 (folld)

Legislation referred to

Contracts Act 1950 s 36(1)
National Land Code 1965 Form 12 A
Rules of the High Court 1980 O 15 r 16, O 33 r 2

A *S Balarajah* (*Balarajah & Co*) for the plaintiffs.
S Seeralan (*D Krishna* with him) (*Mahadevi Ganeshmurugan & Co*) for the defendant.

Mohd Ghazali JC: This is an appeal against my decision on 18 October 1994 relating to a question which I have ordered to be tried as a preliminary B issue, pursuant to O 33 r 2 of the Rules of the High Court 1980 ('the Rules'), before the trial of the action as a whole. The question or issue posed to me by the plaintiffs which I have decided in the affirmative is whether on a true and proper construction of an agreement dated 14 November 1981 entered into between the plaintiffs as landowners and C the defendant as developer, the said agreement has expired through effluxion of time.

The facts of the case are as follows:

By an agreement dated 14 November 1981 both parties entered into a joint venture agreement (hereinafter referred to as 'the said agreement') D to develop nine pieces of land, consisting of approximately 42 acres, into a housing estate (hereinafter referred to as 'the said lands'). By the said agreement, the plaintiffs, the land owners, put forth the said lands as their portion of the investment to develop the said lands and the defendant, a company, agreed to be liable for all the monetary outlay for the actual E development of the housing project.

Under the terms of the said agreement, the defendant undertook to obtain the necessary approvals from the appropriate authorities for the sub-division, conversion and the layout plan for development of the said lands and to bear all expenses incurred to obtain such approvals, within F three years of the date of the said agreement, that is, by 14 November 1984.

It was further agreed under the said agreement that the plaintiffs would grant an extension of six months to the defendant at the end of three years upon proof that the defendant's applications for the necessary approvals mentioned above had been duly submitted and were pending. G

It was also agreed that if for any reason the necessary approvals were not obtained by the defendant within the stipulated period mentioned above or for any reason the appropriate authorities shall disallow or refuse to give the necessary approvals as aforesaid, then the plaintiffs shall be entitled to terminate the agreement whereupon the said agreement shall be H null and void and cease to have any further force or effect and neither party shall thereafter have any claim against the other in particular for moneys already expended.

The defendant failed to get the necessary approvals within the agreed time-frame as a result of which in August 1985 the plaintiffs filed an I originating summons in the Johor Bahru High Court against the defendant seeking the following declarations, namely:

> That upon a true and proper construction of the said agreement:
>
> (a) the defendant agreed to and was obliged to obtain all necessary approvals within three or three and a half years as the case may be;

(b) if the necessary approvals are not obtained or disallowed, the plaintiffs are entitled to terminate the said agreement whereupon the said agreement is deemed cancelled, null and void and cease to have any further force or effect and neither party shall have any claim against the other;

(c) as the necessary approvals were not obtained within the time envisaged and agreed, the said agreement is terminated through effluxion of time and that the parties thereto shall have no claim against each other; and

(d) the defendant did not have proprietary rights to the said lands.

In its statement of defence, the defendant filed a counterclaim for damages alleging that the plaintiffs had breached the terms of the agreement, namely:

(a) that the said lands were not free from encumbrances as there were 75 caveats lodged against the said lands;

(b) that the plaintiffs had refused to deliver the issue documents of title;

(c) that the plaintiffs had refused to execute a power of attorney so as to facilitate the applications to obtain the necessary approvals; and

(d) that the plaintiffs had refused to execute Form 12A under the National Land Code 1965 which was necessary for an application for approval of surrender of the said lands for the purposes of sub-division.

On 9 December 1985, the High Court in Johor Bahru ordered that the proceedings were to be continued as if the matter had begun by writ and that the affidavits do stand as pleadings. Pursuant to the said order the plaintiffs filed a statement of claim dated 22 January 1990 and prayed for the same declarations as stated above. As to what transpired between 1985 and 1990 is not clear as the court's file, it seems, was misplaced. The file was later reconstructed.

The action was subsequently set down for trial on 27 September 1989 but was adjourned to 1 March 1994 at the request of counsel for the defendant. At the outset of the hearing, counsel for the plaintiffs made an oral application requesting the court to invoke O 33 r 2 of the Rules for an order that the following issue arising in the cause of action be determined first before the trial, namely:

> That on a true and proper construction of an agreement dated 14 November 1981 entered into between the plaintiffs as landowners and the defendant as developers and noting the purport and intent of cll 7, 8, 9 and 35 therein it is declared that the said agreement has expired through effluxion of time.

Order 33 r 2 reads:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

At the hearing of that application to invoke O 33 r 2 of the Rules, counsel for the plaintiffs submitted that the circumstances and the facts of the case

at hand are such that if the aforesaid issue is determined by the court at the outset, the whole action would be disposed of expeditiously thus saving much time and costs. He pointed out that the said O 33 r 2 gives the court power to try a preliminary question or issue at any time during the proceedings. He submitted that the plaintiffs have, inter alia, sought in their statement of claim for a declaration that the said agreement, which forms the subject matter of dispute, is terminated through effluxion of time, and hence the determination of the aforesaid issue at the commencement of the trial will have the beneficial effect of expediting the hearing of the substantial issue in the action, eliminating the need for the discovery of documents and evidence on the other issues and producing a substantial saving of costs.

In his reply, counsel for the defendant objected to the application and argued that the defendant has a counterclaim for general and special damages as it has expended money in attempting to fulfil its obligations under the said agreement, namely, to obtain the necessary approvals from the relevant authorities and argued that the matter should go for a full trial.

I had given due consideration to the application and had on 29 September 1994 rejected the defendant's objections and ordered that the question or issue posed by the plaintiffs be tried first as a preliminary point before trial of the action as a whole, as I was of the view that, if that question or issue posed is answered in the affirmative which would have the effect of granting the declaration sought at that preliminary stage, it is likely to be decisive of the litigation and may well result in the saving of considerable time and expense. To me, the plaintiffs' application falls within the contemplation of O 33 r 2. Furthermore, the question touches only on the terms and conditions of the said agreement and the plaintiffs are not claiming for damages for breach of contract or even costs.

The preliminary question or issue was tried on 18 October 1994 and at the end of the day I answered the question or issue posed in the affirmative which basically amounts to granting the declaration sought by the plaintiffs, namely, that on a true construction of the said agreement entered into between the plaintiffs and the defendant, it is declared that the said agreement has expired through effluxion of time.

The defendant has also appealed against my earlier decision on 29 September 1994 wherein I exercised my powers under O 33 r 2 of the Rules and ordered that the preliminary issue raised by the plaintiffs be tried first. I have given my reasons as to why I allowed that earlier application by the plaintiffs (see *Kumarasamy & Ors v Revathy Development (M) Sdn Bhd* [1994] 3 MLJ 681) and I now give my reasons as to why I answered the questions or issue raised by the plaintiffs in the affirmative which has the effect of granting the declaration sought.

The question or issue is purely a matter of the construction of the said agreement between the parties and that question or issue can be decided on the basis of the said agreement alone, and on that basis, I found that there are no issues relevant to the question or issue raised which would require evidence to be called at the trial of that preliminary point. From my reading of the said agreement, the terms and conditions surrounding the said agreement are clear. Under the terms of the said

agreement, namely cll 8 and 9, the defendant undertook and agreed to do, inter alia, the following:

(a) to obtain the necessary sub-division of the said lands with separate titles and the planning approvals;

(b) to bear and pay for all expenses, premiums, survey fees, costs and expenses in respect of the conversion of the category of land use; and

(c) to ensure that the approval for the conversion of the use of the said lands and the approval for the sub-division and the layout plan for development shall be obtained within three years of the date of the said agreement, that is, on or before 14 November 1994.

It was further agreed that the plaintiffs would grant an extension of six months to the defendant at the end of three years upon proof that the defendant's application for the necessary approvals have been duly submitted to the relevant authorities and was pending. The parties also agreed that if for any reason the necessary approvals were not obtained by the defendant within the stipulated period or if for any reason the appropriate authorities shall disallow or refuse to give the necessary approvals, then the plaintiffs shall be entitled to terminate the said agreement. Upon termination as aforesaid it was agreed that the said agreement shall be null and void and cease to have any further force or effect and neither party shall thereafter have any claim against the other in respect of the said agreement, in particular for moneys already expended by the defendant which it was agreed cannot be recovered from the plaintiffs. Clause 38 of the said agreement provides that time wherever mentioned shall be of the essence.

When the said agreement expired on 14 November 1984, the defendant had yet to obtain any of the necessary approvals for the said development as envisaged by the parties, neither did the defendant make any written application to the plaintiffs for the six-month extension as provided for under the said agreement. The defendant has of course blamed the plaintiffs for the delay which they contended was due to the plaintiffs' refusal to hand over the issue documents of title and their refusal to execute a power of attorney over the said lands and for that, the defendant has added a counterclaim to its statement of defence for damages for breach of the said agreement.

It is clear from the terms and conditions found in the said agreement that the root of the said agreement is found in the said cll 7, 8 and 38, namely, once the necessary approvals were not obtained within three or three and a half years as the case may be, both parties were relieved from those obligations which remained unperformed. It is also clear that time was not merely the essence of the contract, but fulfilment of the promise of the defendant to obtain the necessary approvals on or before 14 November was a condition precedent of the whole agreement. The necessary approvals were not obtained by the deadline and that being so, I find that upon a true construction of the said agreement, it has become void.

In *Jaafar bin Ibrahim v Gan Kim Kin* [1985] 2 MLJ 24, the respondent, the registered owner of a piece of land, agreed in writing to transfer a half share in the land to the appellant, if the latter could obtain approval of the conversion and sub-division of the land from the State Authority of Negeri

Sembilan by 31 December 1977. The appellant failed to obtain the approval by that date and the respondent relied on a provision in the agreement which says 'thereupon the agreement shall become null and void and of no effect'. The trial judge held that the agreement was a conditional or contingent contract and as the deadline for performance of the contingent condition had lapsed, the agreement was null and void. On appeal, the Supreme Court held that this was a case where time was not merely of the essence of the contract, but fulfilment of the promise of the appellant to obtain the approval on or before 31 December 1977 was a condition precedent of the whole contract and since the event had not happened by the deadline, under s 36(1) of the Contracts Act 1950, the contract becomes void. Section 36(1) reads:

> Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, the event has not happened, or if, before the time fixed, the event becomes impossible.

The trial judge said [1985] 2 MLJ 24 at p 26 col 1G–H:

> On a true construction, [the agreement] would be annulled or become void on the happening of an event, ie if the application for sub-division of the land made to the relevant authorities, over which both parties had no control, (not involving, of course any omission or fault of the agent in submitting such an application), was not approved by 31 December 1977. The validity of [the agreement] depended on this approval of his application by that date, and the existence of mutual obligations depended on this condition of approval by the relevant authorities by 31 December 1977.

On appeal, Mohamed Azmi SCJ said (at p 29 col 1A–B):

> Until that condition was satisfied the appellant's right to his share in the land would be kept in abeyance, and whatever services he had rendered and whatever expenses he had incurred towards the procurement of the said approval would be of no consequence unless the condition was satisfied and fulfilled.

In *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211, the subject-matter was a contract relating to the sale of land and it was a condition of the agreement that the sale should be subject to the approval of the Foreign Investment Committee ('the FIC'). The FIC refused its approval but suggested that the property be transferred to a joint venture company of which at least 30% was held by bumiputras. The court held that the agreement became void because of the refusal of the FIC to approve the sale.

On appeal, Salleh Abas CJ (Malaya) said (at p 218 col 2C–E):

> Until the FIC approval was given liability for further performance remained unenforceable, ie suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled. This is in effect laid down by s 33(a) of the Contracts Act which enacts:
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> > 'Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.'

As the approval in this case was refused it means that contingent event becomes impossible and the agreement therefore becomes void in accordance with s 33(b) of the Contracts Act, which is as follows:

'If the event becomes impossible, such contracts become void.'

In the instant case, the facts as stated in the various affidavits together with copies of the documents attached therein, show that the defendant has failed to obtain the necessary approvals by the agreed deadline.

Neither has the defendant produced any document nor correspondence between itself and the relevant authorities which could have at least intimated that the various applications had been submitted and were pending approval.

Be that as it may, the relevant authorities, which would include the state authority or the land administrator as defined under the National Land Code 1965 and the town council or local authority concerned, have discretionary powers whether to approve the applications sought by the defendant within their respective jurisdictions. If these bodies refuse to grant the necessary approvals, the defendant would not be able to proceed any further as was the case in *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd*, referred to above. The facts in the instant case do not even show that such applications were pending approval on 14 November 1984, that is, the deadline of the said agreement.

To me, the preliminary issue has raised a question which if decided in favour of the plaintiffs, would dispense with any further trial as far as the plaintiffs' claim is concerned. Furthermore it is in respect of a matter on which no further light would be thrown at the trial. I am also of the view that an affirmative answer to the question posed will dispense with almost the whole trial. I find that there is nothing abstract or hypothetical about the question, neither is it an academic question. Under O 33 r 2 of the Rules it is clear that the court has power to try a preliminary question of fact or law at the outset. Furthermore, such issue has been raised in the pleadings, namely, it is one of the declarations sought by the plaintiffs.

The normal practice of the courts is that all disputes should be tried together and an order for the separate trial of a separate issue is a departure from the norm, and such order should only be made in exceptional circumstances or on special grounds. I have found that there are exceptional circumstances in the instant case. The plaintiffs are not interested in pursuing the rest of the declarations sought. The authorities discussed above has shown that legally the said agreement has become null and void and has been terminated. The plaintiffs are not seeking damages or even costs. The effect of an affirmative answer to the preliminary point will be that the plaintiffs are now entitled to use the land without the said agreement hanging over their heads or the fear that the defendant may claim that it has an equitable right over the said lands. With an affirmative answer, the plaintiffs would be able to proceed to exercise their rights over the said lands and reap whatever benefits they can get from the land as the legal owners.

Although the reliefs sought are basically based on a declaration, the court may at the outset of the trial order the question or issue raised to be

tried first. In *SI Rajah & Anor v Dato Mak Hon Kam & Ors (No 1)* [1994] 1 CLJ 207, the judge said (at p 212):

> ... the present O 33 r 2 is wider in terms for it is also applicable to questions of fact or to questions of fact and partly of law raised by a party to the suit 'before, at or after the trial' of the suit. However that may be, in deciding whether to allow the preliminary questions to be raised at a trial the court must bear in mind the following observations enunciated in the aforesaid mentioned cases:
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> (1) As a general rule, the court will exercise its power under O 33 r 2 to order a preliminary question to be tried if and only if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go on as a whole.

The trial of the preliminary issue has been ordered. The plaintiffs have asked that the preliminary issue be tried so as to decide whether the agreement is still existing. It is not a hypothetical issue. To me, it is a practical issue of urgency and that this is not a case which should be delayed. The events took place at the end of 1984 and the action was started in August 1985. It is now more than nine years later. I have also been informed by counsel that the plaintiffs are old and sickly. That being so, it is very desirable that the question or issue should be decided as soon as possible before further costs are incurred. With an answer in the affirmative, the plaintiffs can get on with whatever they want to do with the said lands. The existence of caveats upon the said lands as raised by the defendant would be a secondary issue and for the plaintiffs to solve; it has nothing to do with the trial at this stage though it may be relevant to the counterclaim of the defendant.

The question or issue raised is merely to establish in an affirmative way that the said agreement has expired due to effluxion of time. It does not preclude the defendant from pursuing his right on the counterclaim against the plaintiffs for breach of contract which would anyway only entitle the defendant to damages in the event it succeeds. The effect of an affirmative answer to the question or issue posed will indirectly affirm or establish that the defendant has no proprietary right or even an equitable right to the said lands and would dispose of the plaintiff's claim against the defendants irrespective of the counterclaim. In *Palaniappa Chettiar v Sithambaran Chettiar & Ors* [1982] 1 MLJ 186, it was held that in a case where the defendant should contend that a preliminary point of law ought to be heard at the outset, the court should proceed to hear the point of law if this would conclude the whole proceedings and it would not be necessary to try the other issues. It would save time and expenditure which otherwise would result in additional expenditure and be time-consuming should the case go on for full trial of the other issues.

It is anyway not disputed that the counterclaim which the defendant is entitled to pursue is still there. The ball is at their feet once this question or issue posed is answered in the affirmative. Whether the defendant is entitled to any relief consequent upon the question or issue having been determined in the affirmative would now be dependent upon evidence to

be adduced by the defendants based on their counterclaim and it would not be proper for me at this stage to make any observation on it.

Although this action was commenced by an originating summons and although the court had on 9 December 1985, ordered that the proceedings be continued as if begun by writ, I find that there is nothing to preclude the court from invoking O 33 r 2 of the Rules. Even when that rule is invoked and a question or issue is tried separately, it does not mean that the defendant is precluded from proceeding on its counterclaim. Whether it can or cannot succeed on its counterclaim is of course outside the ambit of this preliminary question.

In the instant case, whichever way the preliminary point went, the counterclaim still had to be tried. For the above reasons, I had allowed the plaintiffs to raise the question as a preliminary issue before trial of the action as a whole. I had allowed the question or issue as framed and on 18 October 1994 had requested both parties to submit on that preliminary point only. At the end of the day, I informed both parties that the answer is in the affirmative, namely, I find that the said agreement has expired through effluxion of time. This would mean that the defendant cannot pursue its counterclaim on the basis that the agreement is still subsisting. As stated earlier, it can of course pursue its counterclaim for breach of contract at the proper trial of the counterclaim. The plaintiffs' claim is merely a declaratory action and O 15 r 16 provides that:

> No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

To me this is an exceptional case. The case has been pending for so many years, whatever may be the reason. It benefits nobody for it to hang over both the parties for such a long time. The preliminary question or issue raised is not one of great complexity and will not embarrass, jeopardise or prejudice the counterclaim of the defendant. I see no difficulty in giving an answer in the affirmative and based on the above discussion, I thin I must do it. The issue is purely a matter of construction of the said agreement between the parties and can be decided on the basis of that agreement alone.

I have answered the question or issue posed by the plaintiffs as a preliminary point to be tried in the affirmative, and counsel for the plaintiffs has intimated that he is not pursuing the other declarations sought. That being so, my decision has disposed of the plaintiffs' claim irrespective of the counterclaim. What is left for the defendant to do is to request that his counterclaim for damages for breach of contract against the plaintiffs be set down for trial.

There is no order as to costs.

Order accordingly.

Reported by Anne Khoo